SUPREME COURT, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CAPTAIN BRADY L. PERRY,
PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

Petition For a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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December 1996

QUESTION PRESENTED

Whether the United States Court of Appeals for the Armed Forces erred when it held that there was sufficient evidence under *Jackson v. Virginia,* 443 U.S. 307 (1979) and *United States v. Turner,* 25 M.J. 324 (C.M.A. 1987) to sustain Petitioner's conviction for Larceny and Filing False Claims.

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The petitioner, Captain Brady L. [illegible]ery, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on 30 September 1996.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces is not yet reported in an advance sheet or the Military Justice Reporter. The decision, No. 95–0854, __M.J.__ (30 September 1996), is located at Appendix A. The opinion of the United States Air Force Court of Criminal Appeals, ACM 30766 (A.F. Ct. Crim. App. 1995, 7 April 1995), is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on 30 September 1996. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259 (3) (West Supp. 1996) and 10 U.S.C.A. § 867(a) (West Supp. 1996).

STATEMENT OF THE CASE

The petitioner was charged with allegedly making false insurance claims[1] and statements[2] to the United States Postal Service [USPS], receiving various payments from allegedly

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[1]Charge II, spec. 1 (false claim for $55), spec. 2 (false claim for $40), spec. 3 (false claim for $1500).

[2]Charge IV, spec. 1 (18 U.S.C. § 1001, making a false statement in a matter within the jurisdiction of an agency of the United States).

false insurance claims to the United Parcel Service [UPS],[3] and conduct unbecoming an officer stemming from this alleged misconduct (Article 133, U.C.M.J., for submitting false claims as charged under Charge II). The insurance claims related to damage sustained to products manufactured and sold by L&P Artworks from April to August 1992. This business sold artwork classified as limited edition lithographs.

L&P Artworks was a business partnership comprised of the petitioner, his wife, Captain Jenny Perry, Major Brandt Laird, and his wife, Jeanette Laird. As the only civilian, Jeanette Laird was designated by the business in the beginning to handle most of the leg work, to include packing, shipping, and marketing efforts. However, after increasing damage, Captain Perry became more involved. (R. 130, 177, 187, 194).

L&P Artworks was a primarily self–contained business partnership that developed the concept, commissioned the artist, purchased all construction materials, marketed, sold, shipped commemorative lithographs, and re–shipped the product if it was damaged in the mail. In essence, the partnership acted as the concept developer, manufacturer, wholesaler, retailer and shipper. Because of their inexperience, initial retail price estimates suggested by the partners were $40, $65, and $100 each. The eventual selling prices were primarily about $40, but later briefly included $29, and then $100 each.

Also, because of their business inexperience, L&P Artworks initially believed for a brief period, that they could only insure each lithograph for $50 because of its actual sales price, adding only incidental cost for taxes, shipping and packaging, and reissuing replacement prints by the author.

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[3]Charge I, spec. 1 ($550), spec. 2 ($120), spec. 3 ($360), spec. 4 ($100).

(R. 569–570, 580). However, under postal rules, there was no firmly established limit or definition of what a business could claim as "declared value" for insurance purposes, as long as the basis relied upon commercially permissible costs for that particular type of business entity.

The "declared value" is the language used in the insurance and claim forms from UPS and USPS. These postal forms did not direct that retail or wholesale price could only be the declared value.

However, early in the shipping process, a substantial amount of the lithographs became damaged in transit to customers. The business was using long round tubes that held 5 or more lithographs each. Jeanette Laird, who was still handling most of the packing and shipping, investigated whether different shipping containers had damage as well. Moreover, the triangle–shaped containers were smaller and could only hold two lithographs. Therefore, the partnership still continued to use the long round tubes on occasion depending on how large an order was. Different packing techniques were used to minimize risk in both containers.[4]

Because of the substantial damage to the lithographs, advice from postal officials, and gained experience handling a

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[4]R. 139–40, (J. Laird testimony; "we tried the triangle tubes, but had damage with them too . . . we started to use the triangle tubes regularly **but still used the round tubes when we needed to . . . the triangle tubes did not hold 5 lithographs, only 2** [emphasis added]. . . . we used better shipping procedures to avoid high increases in shipping costs."); R. 131, 139–40 (after damage, Lairds re–sent some lithographs in long round tubes); *and* in triangle tubes as well); *and see* R. 130, 177, 187, 194, (J. Laird as designated employee, had most experience and knowledge in repacking and shipping damaged product.) R. 670 (petitioner corroborating that triangular tubes generally offered better protection for small orders but there were other reasons for continuing to use the long round tubes on occasion.)

contained limited artwork business, the partnership thereafter agreed on $100 of postal insurance for each lithograph, based upon a joint determination of its declared value, or loss to the business. The partnership now realized that legally, they were no longer bound by simply the actual sales price as the declared value. The partnership now included as the basis for the replacement value various factors such as the cost, labor, time and materials invested to develop, produce, market and ship the products, the unique condition of the products as irreplaceable "limited edition" lithographs, appreciation from higher demand of the lithographs as limited art work, any loss of business dealings or sales opportunities from damaged products, and the extra labor, time and materials invested to reproduce and re-ship lithographs that were damaged from shipping or other causes. Testimony from the partners varied somewhat as to which of these factors they personally considered most important in arriving at the $100 insurance value. Testimony from the Lairds on these factors differed, but was consistent with the Perrys.[5] Consequently, all members of

[5]R. 127–131, 150, 168, 183 (J. Laird; declared value should only be retail price, although she believed the price fluctuated upon market demand which increased beyond expectation, initially $65; she believed the business had no overhead expenses, and for time and labor invested should not be included as it was "for free"); R. 174–176, 188–89 (Major B. Laird's "own basis" for value was appreciation, market demand, and all time and effort to produce and replace irreplaceable limited art; the possibility that if little damage occurred then overruns or excess were to be sold as more lithographs or as posters so that excessive damage and replacement would equate to lost business opportunities from selling the overruns; during partnership dissolution and rising damages, told petitioner to "see what you can get for the claims . . . send us half."); R. 130, 134–35, 151, 412, 422, 425, 429–30, 437–38, 537, 581–582, 585, Pros. Ex. 9; and R. 392, 422 (petitioner's interview with OSI; value depends upon market demand, appreciation of limited artwork in military market, all time effort, materials and labor invested to develop idea, commission artist, produce, market,

L&P artworks knew that it was unnecessary in their particular line of business, to substantiate damage claims with only the actual sales price.

At trial, there was varied testimony on whether the business had subsequently agreed to reduce the insurance claims to $50 on each damaged lithograph instead of continuing to claim the $100 originally insured amount. Testimony centered not around the actual price, but how the increasing product damage, and higher demand and appreciation now affected the earlier agreed insurance value determination. This included whether the value should include the loss of business dealings or opportunities from the damage, should include the unexpected higher demand and appreciation, should include the affect of increasing damage to a limited edition artwork, or should include the affect of availability of some overruns as replacements and whether certain lithograph version replacements would become exhausted.[6]

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[5] Cont. ship product, plus all time and labor to investigate new shipping methods after unexpected substantial damage of products, time and labor invested to resign replacements, chase down claims, reship damaged product, and lost business future dealings from replacing damaged product from overruns; expressed concern too much time and labor being expended); R. 619, 629 (Captain J. Perry; value depends on market demand, appreciation, replacing limited edition artwork, invested time and effort to investigate new packing and shipping methods, repacking and reshipping).

[6] R. 130, 134–135, 138, 546, 581–82, 585, 619, 629, Pros. Ex. 9 (the substantial time, labor and materials to re–issue another lithograph from the artist, time to investigate new shipping methods, to repack and reship products with new containers requiring construction, to handle client inquiries, less time to devote to new or other business opportunities); R. 131, 150, 183, 585, 619, 629, Pros. Ex. 9 (unexpected demand and appreciation of limited art in military market); R. 174 (affect of some overruns replacing limited edition artwork); R. 174–177 (overruns might have been otherwise sold as more stock or as posters).

Various employee witnesses from UPS and USPS testified that generally, the declared value of a damaged product for insurance purposes depends upon consideration of the same factors applied by L&P.[7] They testified that the initial insured value, or even the retail or wholesale sales price, does not limit what can be later claimed upon damage.[8] They testified that declared value or loss to a business does not necessarily mean the retail price of the damaged goods. *Id.* They testified that the considerations in determining declared value or business loss are left up to the customer, unless a specific trade agreement has been negotiated between the common carrier and retailer or wholesaler determining exact value.[9] If no agreement was in effect with the common

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[7]R. 205, 211, 213, 221, Testified that generally, considerations in determining declared value of a damaged produce for insurance purposes, without a trade agreement, includes whatever is invested in that item plus the purchase price; if not a retailer or wholesaler, and if the customer did not just buy the item in a store and instead constructed or shipped it themselves, then it includes any time and effort invested on an hourly basis, appreciation, repair bills, etc. The precise value is "very hard to set."

[8]For example, an item insured for $20 can be later claimed at $400 if the item appreciated. R. 222. **USPS would require creation of a new receipt as an "updated receipt" to reflect the actual value after damage,** or some informal letter or statement of value. R. 226–27. Will accept virtually anything. R. 220, 345, 351. UPS guidelines are to "make the customer whole" from their loss, and substantiation "will not stand on technicalities," a handwritten letter will suffice. R. 261, 268–269. *See* R. 332–335 (UPS loss prevention supervisor) A $50 insured item can be claimed at $100 if value went up; it is more than replacement rather whatever entitled to payment from loss sustained.

[9]R. 474, 482, 487–88 (testifying industry agreements have been developed using common trade practices generally applying to wholesalers and retailers using damage claims history. These are then specifically negotiated with the common carrier. It depends on the type of operation. A retailer's replacement value is generally the

carrier, the term "customer counter customer" applies, and the rules for determining declared value become "more vague" and are not based simply upon retail price or wholesale costs to recreate it.

No trade agreement existed between L&P Artworks and UPS or USPS, and the business was identified as a customer counter customer. It was not identified as exclusively either a wholesale or retail operation. As such, testimony from UPS and USPS was vague as to the declared value or business loss suffered by L&P Artworks on each damaged lithograph. No witness appraised or determined the declared value of a destroyed lithograph to L&P Artworks. They only testified what factors generally should be considered. It was thus apparent that any simple retailer or wholesaler analogy to L&P Artworks was inappropriate since the partnership was a primarily self–contained operation with functions including concept design, manufacturing, wholesale, retail, marketing and shipping.

Testimony from a reputable art dealer who retailed lithographs discussed various business practices used to establish an insured value of lithographs. Limited edition lithographs normally increase in value even before an item becomes sold out. (R. 499, 501). Lithograph overruns or "artist proofs" have more value than originals. (R. 503). The amount to insure includes at least price, materials, time and labor invested to pack and ship a product, and to recreate, repack and reship a replacement product, "or whatever is

[9] Cont. replacement cost of the item off–the–shelf without lost opportunity costs because very little time and effort is expended to replace the goods; they immediately replace it with the identical off–the–shelf without time or labor to remanufacture, re–market, or reship it. However, a wholesaler's value includes materials, labor, time and effort to recreate the damaged item, and any lost business or opportunity costs if the effected retailer obtains a replacement elsewhere).

included in that." (R. 505).[10] There was also unrebutted expert testimony that it was an acceptable business practice, in limited artwork, to lower the price as a sales incentive, even if the value is increasing. (R. 509). Finally, unless the business has previous experience in the field, it can be "extremely confusing" to assess an accurate insurance value. The accused and other partners testifies they had little practical business experience and no prior lithograph experience.

After the partnership split up in mid June 1992 due to a duty station transfer, the Lairds sold their interest but arranged to have half of all pending insurance claims forwarded to them. Testimony indicates the Lairds tacitly agreed to claim $100 on each damaged product because they were aware that the petitioner would claim $100 on these insurance claims after they left."[11]

Facts relating to each specification:

Charge I, larceny, refers to UPS claims from damaged products in the amounts of $550 under specification 1 [hereinafter "Held" claim], the amount of $120 under specification 2 [hereinafter "Johnson" claim], the amount of $360 under specification 3 [hereinafter "Gregorcyk" claim], and $100 under specification 4 [hereinafter "Henley" claim]. The petitioner was acquitted of larceny specifications 1, 2, and 4, and was convicted of specification 3, the Gregorcyk claim.

The Held claim (spec 1) was based upon allegations that

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[10]The witness was only an art retailer, and had no role in design or creation, commissioning artists or reissuing lithographs, did not print the product, was not the shipper or wholesaler.

[11]R. 143, 161, 170, 183, 189 (Lairds admittedly knew accused would make $100 claims; upon split up, B. Laird told petitioner to see "what he could get for the claims" and send them half; The Lairds later received their share).

the accused had claimed over $500 when five replacements were destroyed (insured for $100 each), or over $1000 claimed total.[12] The alleged larceny of $550 was that the declared value of the lithographs was not $100 each but was approximately the retail price of $40 each plus shipping. Petitioner however, was acquitted of this specification of larceny, possibly because the members found that the $100 declared value per lithograph was reasonable. In the alternative, the members found the defense of mistake applied and there was a lack of specific intent since he was honestly mistaken that the declared value was $100.

The Johnson claim (spec 2) was based upon allegations that the accused had stolen over $120 from UPS for two destroyed lithographs with insurance for $50 each. (Pros. Ex. 16, 16/2, 16/3). Here, the total claim was for over $200 for the two damaged products. The alleged larceny was that the declared value of the lithographs was simply the retail price of $40 each plus shipping, not $100 each, so that the extra $60 per lithograph was the subject of the larceny. Once again, however, Petitioner was acquitted of this specification of larceny, because the members found that the $60 beyond the mere retail price was a reasonable declared value per damaged lithograph. In the alternative, the members found the defense of mistake applied and there was a lack of specific intent since he was honestly mistaken that the declared value was $100.

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[12]25 Lithographs sent out April 27, 1992 (retail at $40 each, insured for $50 each, Pros. Ex. 6/2), with 5 destroyed and picked up the same day; two claims submitted July 6, 1992 for the 5 damaged product for a total claim of over $500, Pros. Ex. 10. Five replacements (insured for $100 each, Pros. Ex. 4, 5) were numbered the same as the damaged ones. These 5 replacements sent May 14, 1992 were also destroyed and picked up the same day (Pros. Ex. 15, "complete order scrapped" and a claim submitted for over $500 on July 6, 1992. *Also see* register of Claims at Pros. Ex. 11/3, 11/4 (LDI claim # 13262945 (Held) showing claim registered 6 July).

The Henley claim (spec 4) was based upon two damaged lithographs, initially insured for $50, but later claimed at $100.[13] The alleged larceny of $100 was that the total declared value of two lithographs was not $200 but half, or approximately twice the retail price of $47.60 each plus shipping. Petitioner was again acquitted of this specification of larceny, because the members found that the $100 declared value per lithograph was reasonable or that the defense of mistake applied.

The Gregorcyk claim (spec 3):

The Gregorcyk claim was based upon six damaged lithographs, initially insured for $50, but later claimed on 14 July at $100 each for a total claim of $600. (Pros. Ex. 17/2–17/7, R. 698). The alleged larceny of $360 from the total claim was that the total declared value of the six lithographs was instead $240, or approximately six times the regular retail price of $40 each.

Jeanette Laird initially sent 10 lithographs to Mr. Gregorcyk on 27 April 1992 in two separate packages, with five in each package. Each lithograph was insured for $50.00, or $500.00 total. (Pros. Ex. 17/1; R. 314). As noted above, this was the initial insurance early in the shipping process where the declared value was primarily based upon the actual cost of each lithograph instead of the replacement cost. (R. 596–570, 580). However, 5 lithographs from one package were damaged and picked up on 27 April 1992. Five replacements were immediately by Jeanette Laird but no claim was filed by

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[13]Pros. Ex. 3/1, 3/2, 3/3, 17, 11/2, 11/3 (two claims for $102.58), App. Ex. XIV (Stipulation of Henley, that first lithograph was damaged so two replacements were sent with one replacement damaged); Pros. Ex. 9/2 and 11/3 (LDI claim # 1326291214 claim registered 6 July 1992).

her.[14] This shipment of 6 lithographs was insured for $100 each. Only one was damaged in this new order, and the shipment was returned with only the one damaged lithograph. The other undamaged five lithographs were retained by Mr. Gregorcyk. (App. Ex. X).

Because Jeanette Laird had never submitted a claim for the 5 Gregorcyk lithographs damaged on 27 April and later replaced, Petitioner, on 14 July, decided to submit one claim for six total damaged products for $600. Petitioner submitted a document reflecting his increased replacement value of the 5 lithographs replaced on 28 June, and the sixth lithograph replaced in early July. (Pros. Ex. 17/7). The document submitted does not state that the value was the actual price the items were sold for. The 24 July damage claim does not refer to the 5 lithographs damaged on 27 April, but instead mistakenly refers to the new Gregorcyk order of six lithographs sent to Mr. Gregorcyk in June, where only one of this new order was damaged. Regardless of this sloppy bookkeeping, Petitioner was still submitting a claim for six actually damaged lithographs. Moreover, postal records show that the 5 lithographs damaged in April were insured for their approximate cost of $50.00 which primarily included actual price, with added shipping and postage. (App. Ex. 17/1, R. 569–570, 580). Therefore, the substantiating document that accompanied the July claim submitted by Petitioner in July, could not represent actual selling price but only increased replacement costs in light of the unanticipated significant damages.

This guilty finding appears plainly inconsistent and

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[14]R. 314–327; App. Ex. X (stipulation of expected testimony of Mr. Gregorcyk; no evidence of any claims submitted for damages sustained on 27 April shipment at that time); R. 698 (trial counsel in closing argument noting that replacements sent for damaged ones on 27 April were without any claim).

contradictory with the other not guilty specifications based upon the members' acceptance of $100 declared value or mistake. On first impressions however, the finding of guilty may have been based upon evidence that prior to his $600 claim on 24 July, the petitioner had lowered his price on 2 July 1992 to $29.95 each, thereby presuming that the earlier $100 declared value each could no longer be accurate *after* 2 July. Secondly, the petitioner aware of this much lower price change he had advertised. Moreover, the members may have believed that the petitioner received a false claim by specifically referring to five of the six lithographs sent on 29 July that were not damaged.

However, a more thorough review of the evidence regarding the guilty finding on the Gregorcyk specification shows that this contradiction cannot be adequately explained in the record. First, all the other claims from specifications 1, 2, and 4, were submitted on 6 July *after* the retail price was lowered, yet the accused was found not guilty on these. These findings show that after 2 July either the $100 declared value remained constant or increased, or in the alternative, the defense of mistake still applied. Moreover, an expert witness testified without government rebuttal, that it was an acceptable practice in the lithograph business to lower the price as an incentive even while the value of the lithograph remained the same or was increasing. (R. 509, 499–501). In fact, the accused several weeks later in August sent 10 lithographs to his sister, Kay Price, on consignment with written request asking her to sell them at $100 each, much higher than the $47 earlier price.[15] Lastly, there was no

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[15]R. 537–38 (25 lithographs sent in five tubes on consignment with statements for $100 each, a $2500 total; lithographs were insured at $100 each; sister changed her mind and sent them back; tubes were damaged only upon their return trip to the petitioner with all 25 lithographs destroyed).

reason why the accused could not be legally compensated for or substitute five lithographs that actually had been damaged on 27 April, even though the claim apparently referred to five other lithographs from another shipment that were never damaged.

Charge II involved three specifications of the accused making false claims to USPS by presenting allegedly false claims forms with supporting false receipts.

Specification 1, the "Blakeslee" claim, involved a claim for one damaged lithograph selling for $40 and where the accused presented an alleged fake claim and receipt showing the retail price was $95, with the false amount being $55. (Pros. Ex. 711–715; App. Ex. XI, XVI). Petitioner was acquitted of this specification because the members probably found that the $95 declared value of one lithograph was reasonable, or in the alternative, the defense of mistake applied. Regarding the alleged fake receipt, there was expert testimony that USPS would permit creation of a new receipt as an "updated receipt" to reflect increased value after damage. (R. 226–27, 539).

The Applegate claim:

Specification 2, the "Applegate" claim, involved a claim for one damaged lithograph selling for about $40 and where the accused presented another alleged false claim and receipt showing retail price was $100, with the false amount being $60. (Pros. Ex. 19/1–19/3, App. Ex. XV, XVI). Appellant was found guilty of this specification presumably only because an extra "overrun" print was already available, so there was no "loss of sale" or no lost opportunity cost. (R. 698–699). Trial Counsel cited the Held claim from Charge I, spec 1, as the basis for the fraud since extra prints were also used there as replacements. (R. 699, App. Ex. XII). However, petitioner was acquitted of larceny in that specification where he had

received $100 for each damaged lithograph. Moreover, there was testimony that any remaining lithographs might be sold later to others. or as posters. Therefore, using overruns as replacements would reduce the inventory, and loss of income from future sales opportunities.

Alternatively, the members may have believed that the petitioner was trying to present a false claim by showing the actual price of the lithograph was $100.00, as in the Gregorcyk claim. However, the replacement number listed on the document (#587) was not the item actually damaged and sold (#588), so this document could only really mean the value of the replacement. (Pros. Ex. 19/2, R. 338).

The Price claim:

Specification 3, the "Price" claim, involved a claim submitted 11 August 1992, for 25 damaged lithographs sent to the petitioner's sister on consignment retailing for $100 each, and insured at $100 each. Inserted into the shipments were documents intending to inform his sister the value or the amount the items should be sold for. Captain Perry never testified or indicated to investigators that he had sold them to his sister. The purpose of these documents accompanying the shipments was to indicate to his sister that the lithographs should be sold for $100.00 each, plus tax. (Pros. Ex. 21/4–6, R. 393, 416–417, 420–421, 538). The document does not state who the buyers were, and did not contain language "sold." (Pros. Ex. 21/4–6).

The prosecution and the evidence does not indicate that respondent had created these documents after he learned of the damaged Price lithographs. Rather, the prosecution actually agreed that the documents inserted into these shipments were the same documents submitted by Captain Perry to later substantiate his damage claims, and appearing as a prosecution exhibit. (Pros. Ex. 21/4–6; R. 699)

The prosecution however, alleged these documents were deliberately contrived sales receipts to falsely show that the 25 lithographs were actually sold at a total price of $2500, with the false amount being $1500 (presuming real value at only 440 each). (Pros. Ex. 21–25, App. Ex. XVI). Petitioner was found guilty of this specification presumably for two reasons; using alleged false sales receipts when he never had sold the 25 lithographs sent to his sister, and secondly, because he knowingly sent the 25 lithographs using the defective "long round" tubes instead of the "triangle–shaped" tubes. (R. 699–670).

The guilty finding by the members in the Price claim appears inconsistent with the evidence, and is contradicted by other not guilty findings. First, there was testimony that because the triangular–shaped tubes were damaged and could only hold two lithographs, the partnership continued to use the long round tubes on other occasions depending on how large the order was. (R. 131, 139–40, 764). It would make more sense to the partnership to send a large order of 25 lithographs in 5 long round tubes instead of in 13 triangular–shaped tubes, also petitioner speculated that he did not have many triangular–shaped tubes left.

Secondly, petitioner was acquitted in several specifications where he had already received $100 for each damaged lithograph even though retailing for $40 each and insuring for $50. Here this was near the end of the inventory and the petitioner was asking a retail price of $100 each, with insurance for $100 each, and a claim for the same amount.

The petitioner was acquitted of Charge IV, making a false statement to a postal official regarding the publicly advertised retail price of a certain lithograph at a certain time. The members found the petitioner never stated to the official that the advertised price of the lithograph "The SAC Legacy" was $100 in April 1992, when sold in the Henley and Held

purchases. (Pros. Ex. 3/2, 5, 6).

On 11–15 May 1993, Petitioner was tried and convicted by a General Court–Martial of one specification of a violation of Article 121, Uniform Code of Military Justice [U.C.M.J.], Larceny of $360 from UPS and of two specifications of violations of Article 132 U.C.M.J., making false claims against the USPS in the amounts of $60.00 and $1500.00. Upon appellate review, both the Air Force Court of Criminal Appeals and the Court of Appeals for the Armed Forces affirmed Petitioner's conviction and sentence.

The Air Force Court of Criminal Appeals based its decision by pointing to two facts: appellant in early July 1992 had lowered his price of the artwork by advertising in a local paper, and then later he submitted alleged "false receipts" purporting to show the artworks had been "sold" at a much higher price to support his damage claims. (Appendix B).

The United States Court of Appeals for the Armed Forces was divided. The majority merely adopted the findings of the Air Force Court of Criminal Appeals and affirmed petitioner's conviction. However, there was a strong dissent in which Judges Sullivan and Gierke say that there was no evidence that the writings were offered to the post office as receipts for actual sales. (Appendix A).

Petitioner was sentenced to a dismissal from the Air Force and fined $3,000.00. In September 1993, the convening authority approved the sentence. On 7 April 1995, in an unpublished decision, the Air Force Court of Criminal Appeals affirmed the findings and sentence. The United States Court of Appeals for the Armed Forces granted review of petitioners case and, by a 3 – 2 decision, affirmed petitioner's conviction.

REASON FOR GRANTING THE WRIT

THERE IS INSUFFICIENT EVIDENCE UNDER *JACKSON V. VIRGINIA*, 443 U.S. 307 (1979) AND *UNITED STATES V. TURNER*, 25 M.J. 324 (C.M.A. 1987) TO SUSTAIN PETITIONERS CONVICTION FOR LARCENY AND FILING FALSE CLAIMS.

This is an extraordinary case where there is no rhyme or reason to the members' findings when closely compared to their acquittal on the majority of the other related specifications. A thorough and discerning review of the evidence and complex facts bears out the shallowness and inconsistency of their confused rationale, and exposes reasonable doubt regarding specific intent. It appears the factual complexity and vagueness in determining value overwhelmed the members, and the Air Force Court of Criminal Appeals and the Court of Appeals for the Armed Forces, and allowed confused and contradictory findings and results.

In testing for legal sufficiency, the Court must determine whether a reasonable fact finder could have found all the elements of the offense and excluded all defense beyond a reasonable doubt, when viewing the evidence in a light most favorable to the government. *Jackson v. Virginia,* 443 U.S. 307 (1979); *accord United States v. Turner,* 25 M.J. 324 (1987). Because at trial the evidence raised the defense of mistake, the government also had the burden of disproving such a defense beyond a reasonable doubt.

In testing for factual sufficiency, the test is whether, after weighing the evidence in the record and making allowances for not having personally observed the witnesses, Appellate Courts are convinced of petitioner's guilt beyond a reasonable doubt. *United States v. Bonano–Torres,* 31 M.J. 175 (C.M.A.

1990); *see United States v. Rath*, 27 M.J. 600, 604 (A.C.M.R. 1988).

The Air Force Court of Criminal Appeals based its decision by focusing on two meaningless details: petitioner in early July 1992 had lowered his price of the artwork to about $30 each by advertising in a local paper, and then later to substantiate damage claims, he decided to submit allegedly "false receipts: to postal officials intending to show the artworks had actually been sold at a much higher price of $100 each. The court principally highlighted these alleged false receipts, assuming they were sufficient to show intent to deceive. These "receipts" were the focus of the dissenting judges at the Court of Appeals for the Armed Forces. The dissenting judges did not agree with the Air Force Court of Criminal Appeals' factual determinations. The dissenting judges found no evidence that petitioner intended these documents to be "receipts."

First, it is simply not reasonable to believe that Captain Perry intended to concoct false sales receipts to substantiate these damages claims when the entire partnership knew early on that it was completely unnecessary to rely upon the sales price to substantiate damages claims, particularly as a self–contained entity in the business of limited edition artwork. Moreover, it was the substantial damage to the lithographs, legal advice form postal officials, and commercially acceptable insurance practices in limited artwork, that forced L&P to raise the replacement value based upon a myriad of other costs. L&P Artworks early on decided that legally, they were no longer bound by simply the actual sales price as the declared value, and thus raised it to $100 each.

The partnership further knew that it was ridiculous to not include in damage claims the cost, labor, time and materials invested to develop, produce, market and ship the products,

the unique condition of the products as irreplaceable "limited edition" lithographs, appreciation from higher demand of the lithographs as limited artwork, any loss of business dealings or sales opportunities from damaged products, and the extra labor, time and materials invested to reproduce and re–ship lithographs that were damaged from shipping or other causes. Consequently all partners of L&P Artworks knew that it was unnecessary in their particular line of business, that they had to substantiate damage claims with only the actual sales price.

Secondly, the expert testimony from art dealers and postal officials plainly confirms that in this particular type of art business, the actual retail price was not the basis for substantiating damage claims.

Thirdly, the chronology of claims shows that the postal employees encouraged and condoned petitioners use of revised sales receipts to substantiate his claims. Petitioner in May 1992 was sent a letter from UPS to "please send your original invoice or other verification of cost" to substantiate the claim. (Pros. Ex. 3/3). Petitioner had nothing so he wrote a statement explaining the investment in the replacement cost and showing he was entitled to the $100 claimed for each piece. Petitioner in subsequent claims therefore presumed he needed to create some receipt or invoice showing the higher value, and submitted just such a "replacement receipt." (R. 707, Pros. Ex. 7/4, 7/5). There was expert testimony that USPS would permit creation of a new receipt as an "updated receipt" to reflect increased value after damage.

In light of this evidence, it simply defies common sense to presume, beyond a reasonable doubt, that petitioner knew he had to deceive postal officials with false receipts in order to substantiate his damage claims of limited edition artwork with actual sales prices. As Captain Perry indicated throughout the entire investigation and trial, these were not "false sales receipts" but were only a means to indicate total replacement

value of limited edition artwork.

Regarding the alleged false receipts, the Air Force Court only discussed the Price claim as clearly indicative of the intent to deceive. The Court here proposes a fantastic proposition; Captain Perry decided to fabricate false receipts to show postal officials he had actually sold 25 lithographs to his sister when he had not sold any, however, the government below agreed that these receipts had been "inserted" into all five shipments for the intended purpose of indicating to his sister how much to sell them for in Arkansas. The Court below incredibly presumes that Petitioner falsely created receipts showing an actual sale of 25 lithographs, then inserted the receipts into the 5 shipments to his sister *knowing* that the post office would actually damage *all* 5 of the shipments and *all* 25 lithographs therein, and *knowing* that his sister would refuse acceptance and return all 25 to the post office.

Moreover, the government does not contend, and the record does not support, that Captain Perry decided to write these receipts after his 25 lithographs were returned and discovered damaged. Certainly Captain Perry, at the time he inserted the receipts into the shipments, was only concerned in completing a consignment sale to his sister hoping she would sell them for the intended price of $100 each plus tax. Moreover, these documents do not state who the buyers were, and did not contain language "sold."

To support the government's absurd theory, the prosecution amazingly argued at trial that Captain Perry knowingly sent the 25 lithographs using the defective "long round" tubes instead of the "triangle–shaped" tubes. However, evidence undeniably sets forth that this fact was cleverly misrepresented by the government. Rather, the partnership would continue to use the long round containers in occasions like the Price claim, when a large order was involved. A careful and reasonable fact finder cannot ignore that the

petitioner followed sound business practices yet find he intended to defraud the postal service.

The second aspect of the Court's decision rests on the alleged pivotal 2 July lowering of the price of each lithograph from about $40 to $30, and that the convicted specifications involved $100 claims submitted after this date. For several reasons, this fact cannot be dispositive on implying that value had reduced and that Captain Perry had to reduce his claims.

First, after this alleged pivotal date, petitioner on 6 July submitted other $100 claims, and was acquitted of those specifications. The 2 July advertisement certainly did not affect the value of those claims.

Most significantly though, there was unrebutted expert testimony that it is a common sales incentive technique in selling limited edition artwork, such as these lithographs, to later temporarily lower the sales price while the actual vale of the art was still increasing or appreciating. Petitioner had every right to seek even higher than the $100 claims submitted for each damaged lithograph in July even though the incentive price was lowered. Thirdly, this expert then declared that the value of limited edition artwork increases as the supply swindles. For example, the price claim involved sending a bulk shipment of 25 prints on 27 July 1992 to Captain Perry's sister on consignment proposition to make both parties money. These were sent, not sold on 27 July, and constituted nearly the end of the lithograph editions. This task no doubt, would require selling this many prints throughout the future months. Moreover, petitioner's purpose was to indicate to his sister to try to sell this vast amount at a higher price to allow profit for both parties, in a typical consignment sale.

Also, in response to the Price claim, the petitioner had an additional lost sales opportunity cost because he lost a consignment sale from a buyer, his sister. Petitioner lost the

opportunity to replace the damaged product and still make a sale at any price. The declared value of earlier replacement claims of $100 of lithographs priced at $40 included, among other things, the additional time, labor for replacement, and appreciation. The petitioner testified that if applicable, declared value of claims also included any lost business dealings.

In light of this unrebutted evidence, the lower advertised price on 2 July is not dispositive as to value for purposes of criminal intent, but rather expert testimony created a gaping hole of reasonable doubt by concluding that value increased if anything.

Conclusion

For the foregoing reasons, this Honorable Court should reverse the decisions of the Air Force Court of Criminal Appeals and the Court of Appeals for the Armed Forces and set aside the findings and sentence. Petitioner respectfully submits that based upon the Court's explanation for affirming the finding of guilty, and accompanying review of the record, all the elements of larceny and submitting false claims cannot be established beyond a reasonable doubt. Petitioner was guilty of nothing more than poor record keeping, not a criminal offense.

WHEREFORE, petitioner requests that this writ be granted.

Respectfully submitted,

W. CRAIG MULLEN
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Appellate Defense Division
Counsel of Record and for the Petitioner

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11 December 1996

APPENDIX A

UNITED STATES, Appellee

v.

Brady L. PERRY Captain
U.S. Air Force, Appellant

No. 95–0854
Crim. App. No. 30766

United States Court of Appeals for
the Armed Forces

Argued May 22, 1996
Decided Sep. 30, 1996

Counsel

For Appellant: *John A. Wickham* (argued); *Colonel Jay L. Cohen, Captain W. Craig Mullen, Captain Eric N. Eklund* (on brief).

For Appellee: *Captain R. Scott Howard* (argued); *Colonel Jeffery T. Infelise,* and *Lieutenant Colonel Michael J. Breslin* (on brief).

Military Judge: Peter R. Held

Opinion of the Court

COX, Chief Judge:

Contrary to his pleas, appellant was convicted by a general court–martial composed of members at Offutt Air Force Base, Nebraska, of larceny, and filing a false claim against the United States (2 specifications) in violation of Articles 121 and 132, Uniform Code of Military Justice, 10 USC §§ 921 and 932, respectively. Although he was also convicted of conduct unbecoming an officer by preparing false claims, in violation of Article 133, UCMJ, 10 USC § 933, the military judge dismissed this offense as being multiplicious with the other findings of guilty. Additionally, appellant was found not guilty of other specifications alleging larceny, filing false claims against the United States, and making a false statement regarding a matter within the jurisdiction of the United States. He was sentenced to be dismissed and pay a $3,000 fine. The sentence was approved by the convening authority; the Court of Criminal Appeals affirmed the findings and sentence. We granted review of the following issue:

> WHETHER THERE IS SUFFICIENT EVIDENCE UNDER *JACKSON V. VIRGINIA*, 443 U.S. 307 (1979) AND *UNITED STATES V. TURNER*, 25 MJ 324 (CMA 1987) TO SUSTAIN APPELLANT'S CONVICTION FOR LARCENY AND FILING FALSE CLAIMS.

The Court of Criminal Appeals set forth the following facts concerning the foregoing findings of guilty:

Facts

> While assigned at Offutt Air Force Base in 1992, appellant, along with his Air Force captain

wife, an Air Force major, and the major's civilian wife, established a business to produce and sell commemorative lithographs. They pooled their resources and commissioned an artist to create a lithograph commemorating the stand–down of Strategic Air Command. They arranged for a limited printing of 750 copies of the lithograph, with each print numbered consecutively and signed by the artist. In addition to the 750 numbered prints, the printers also provided them with a supply of unnumbered prints that they could use as replacements if any of the original prints were damaged. Based on testimony at trial, the cost per copy was approximately $2. After discussing what customers might be willing to pay for the item, they initially agreed to sell the prints for $40 a copy. They began advertising and marketing the prints under the name "L & P Artworks." As the only civilian in the group, the major's wife was the bookkeeper and was the key player in soliciting sales.

On a number of occasions, L & P Artworks deposited lithographs with United Parcel Service or the United States Postal Service for shipment to customers. Appellant and his associates agreed that the prints should be insured for $100 when they were placed in shipment, even though the cost of the prints was only about $2 a piece and the advertised selling price was only $40. Both the United Parcel Service and the United States Postal Service advised that the value of an item did not have to be established at the time of shipment. However, when loss or damage happened, both the United Parcel Service and United States Postal

Service required claimants to establish the amount of the damage or the value of any item lost.

As sales of the prints progressed, the group discovered the prints were highly susceptible to damage during shipment. Although they changed the type of container used for shipment, damage continued to occur. When damage occurred during shipment, purchasers were told to return the damaged prints. L & P Artworks replaced the damaged item using the extra prints which the printer had delivered to them. The extra print was assigned the same number as the damaged one. The artist, who had signed the original prints, agreed to sign any prints used as replacements for free. Consequently, L & P Artworks was able to replace any prints damaged during shipment without incurring significant costs.

When the major and his wife received an assignment to England, appellant and his wife negotiated to buy them out. The departing couple received $1200 for their share of L & P Artworks when they left Offutt in early July 1992. At that time, appellant became the principal operator of the business. All of the offenses for which appellant was convicted occurred after appellant and his wife took over the business.

In order to increase sales, appellant and his wife reduced the selling price of the prints in early July 1992 to $29.95. However, appellant continued to claim $100 for each print damaged during shipment. When asked to substantiate the amount claimed from the United Parcel Service or the United States Postal Service, appellant indicated that the amount claimed represented the value of the

> item. He referred to the fact that the item would appreciate in value over time, that L & P Artworks had agreed to insure the prints for $100 and that $100 was the indicated value of the item at the time it was shipped. On the three specifications for which appellant was convicted, he actually substantiated the damage claims with receipts in his own handwriting purporting to show that the prints had been sold for $100 each, plus tax and shipping.

Unpub. op. at 1–3.

As a rational trier of fact could have found the foregoing information from the evidence presented during appellant's court–martial, we are obligated to accept the statement of facts. *United States v. Curtis,* 44 MJ 106, 148 (1996), *quoting Jackson v. Virginia,* 443 U.S. 307, 319 (1979). We proceed now to examine those facts to determine if all the essential elements of the crimes were proven by the prosecution.

The elements of the offense of larceny under paragraph 46b(1), Part IV, Manual for Courts–Martial, United States, (1995 ed.), are:

> (a) That the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person;
>
> (b) That the property belonged to a certain person;
>
> (c) That the property was of a certain value, or of some value; and
>
> (d) That the taking, obtaining, or withholding by the accused was with the intent to permanently deprive or defraud another person of the use and benefit of the property or permanently to appropriate the property for the use of the accused or for any person other than the owner.

Under paragraph 58b(1), Part IV, Manual, *supra*, filing a false claim against the United States requires proof:

> (a) That the accused made a certain claim against the United States or an officer thereof;
>
> (b) That the claim was false or fraudulent in certain particulars; and
>
> (c) That the accused then knew that the claim was false or fraudulent in these particulars.

In the present case, appellant was alleged to have committed the larceny by false pretense, which required proof that the pretense was false and that appellant knew it was false "in the sense that it is made without a belief in its truth" and "it must be an effective and intentional cause of the obtaining." Para. 46e, Manual, *supra; United States v. Bethas*, 11 USCMA 389, 29 CMR 205 (1960). As to the two specifications alleging false claims, we noted the following in *United States v. Ward*, 16 MJ 341, 345 (1983):

> The challenged specification includes the words "false and fraudulent," but such pleading does not change the nature of the specific criminal intent required to be shown by the Government. *United States v. Ariola*, 2 U.S.C.M.A. 637, 10 C.M.R. 135 (1953). It must show that the claim was "deliberately deceitful," meaning that appellant made an untrue representation of a material fact knowing it was untrue and with the intent to defraud another. *Id.* at 640–41, 10 C.M.R. at 138–39. *See* § 4–115, *Military Judges' Guide*, Department of the Army Pamphlet 27–9 (1969).

As observed in the quoted findings of fact by the Court of Criminal Appeals, the appellant provided documentation to support his claimed value, which was prepared in his own handwriting, reflecting the sale of the items for $100.00 per

copy when, in fact, no such transaction had ever been consummated. Here, the appellant has challenged his conviction on the basis that the prosecution failed to prove the requisite knowledge and intent. The appellant was convicted in the present case on the theory that the difference ($60.00 per copy) in the proffered sale price ($40.00) and the claimed value ($100.00) constituted an area where all the criminal elements could be found.* Reduced to basics, this case involves an accused who, when required to substantiate a claimed value of an item, responded by manufacturing documents that were false in fact. We hold that a rational trier of fact could find the requisite intent and knowledge.

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Judge CRAWFORD and Senior Judge EVERETT concur.

SULLIVAN, Judge (dissenting):

This case is not as simple as the majority asserts. As I see it, the question before this Court is whether there is *any evidence* supporting the following factual finding made by the Court of Criminal Appeals and relied on by this Court to show deceit. The lower appellate court said, "On the three specifications for which appellant was convicted, he actually substantiated the damage claims with receipts in his own handwriting purporting to show that the prints had been sold for $100 each, plus tax and shipping." Unpub. op. at 3. I see no evidence in this case that these writings were offered by appellant to the post office as receipts for actual sales of the prints or received by post office as anything other than an

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*One of the offenses was alleged as larceny because appellant actually received payment for the claim.

invoice. More importantly, the majority does not identify such evidence in its opinion.

Turning first to the prosecution's case, its principal witness, Mr. Martin, the window clerk at the Offutt Air Force Base Post Office, established that these writings were invoices, not receipts. He testified:

> Q: How do you recognize this document?
>
> A: Well, I don't know if I had anything to do with this one or not. It's a postal claim for damages or a loss.
>
> Q: Let me direct your attention to Prosecution Exhibit 22, page 1. Do you recognize that?
>
> A: Yes, that's one that I had something to do with.
>
> Q: How do you recognize that?
>
> A: Well, a customer came in with a damaged good and put in a claim and plus that, we give them forms to fill out and after it is filled out properly *and we get the invoice or receipt or whatever is necessary to prove the value,* we take the goods and sent them downtown.
>
> * * *
>
> Q: Did you have any discussion regarding how to prove the amount claimed or value?
>
> A: How to--
>
> Q: How to substantiate the amount claimed?
>
> A: *Well. the gentleman that came in with the claim already had--we just asked for proof of value and we--I believe he gave me an invoice.*
>
> Q: Let me ask you to turn to Prosecution Exhibit 21, page 4, 5, and 6. Do you recognize those documents?

A: *Well, that looks like the invoice that was given to--*

Q: Does that appear to be the invoice that he gave you?

A: It looks like it, right.

Q: Was there any discussion about that invoice?

A: No. It looked genuine to me and I just took it in at the time.

Q: *Did you require anything else other than the invoices?*

A: *Nothing. I required nothing else other than the invoice.* If there is any problem it usually starts with Becky, if she would not accept it.

(Emphasis added.)

Turning to appellant's testimony, he also describes these writings as invoices. He testified:

> And I mentioned, I had talked to her [his sister] about this venture because she had done other things on this, well, not on this nature. She had owned a restaurant, fast food restaurant, and she had two, I guess, two fast food restaurants and she had been in some sort of business and I told her about this and she said it was really good. And I asked her, I said, well, would you--these are doing well up here and we're--let's see, this is October, and we're getting ready to go so we've, it seemed like we may have saturated the market up here, for a better word, so I asked her, why don't you try selling some there, and I'm sure that you can get a good price for them or something to that effect. And that's when I sent her these five tubes with five lithographs in each one to sell for $100.00 each down there.

Q: You sent five lithographs per tube and five tubes?

A: In five separate tubes.

Q: Now had there been any discussion between you and her as to what she would sell them for?

A: Not exactly, a price, no.

Q: Did you include some receipts or documents when you sent those to her?

A: I sent her some, yes, some receipts in there with it, with each number--with the number of each lithograph in the tubes at $100.00 each.

Q: *Why did you do that?*

A: *I guess for a better word, to tell her that that's what we should try to sell them for down there.*

Q: Okay, did you do this--did you ever instruct her to damage the tubes and try to make claims on them?

A: No.

Q: Did you--was it your intent to try to make claims on these when you mailed them to your sister?

Q: Did you know that they were going to be damaged when you mailed them to your sister?

A: No.

Q: Back to Inspector Mitchell for a second. How many of these prints did you sell all total?

A: I couldn't tell you exactly. Roughly, at the time we bought out the Lairds, I believe we had around 350 left, but that would be a real rough guess.

Q: Now when was the first time that you yourself actually submitted a claim either to United Parcel Service or to the Postal Service?

A: When?

Q: Yes, do you recall?

A: I couldn't tell you exactly.

Q: If you don't recall the date, do you remember the first incident in which you had to make a claim?

A: It seems like the first one was this one when I went to the--well, UPS or a claim, any claim?

Q: Right. Well, let's--whatever you think happened first.

A: From the best, from what the best I can remember even after looking at all the documents, I suppose, I remember going to the Papillion Post Office and showing them the damaged lithograph and asking them what to do and the claim paperwork, I remember getting the claim paperwork and asking them some general guidelines on how to fill it out. I filled out what I thought was correct on the form and they said, well, you need a receipt or something to, I guess, justify the dollar amount you're claiming. And I didn't understand exactly what he meant so--and he said, well--on, I didn't have the original, I didn't have a receipt for this one and he said if you don't have one, then--but I think I did mention something about well, I've got these, the receipt books, what we fill out to send to everyone else. He said, well, then you could just write on there, write up another receipt for the value that you're claiming for your insurance.

Q: Did you, at that time, what was your belief as to what you were entitled to collect on insurance?

A: I believed, well, I believed we were--the value of our lithographs, what we had agreed on, and it was--at this time I'm not sure, well, we believed

> we were--we could collect a $100.00, what we had agreed on for the value of each lithograph that was damaged.
>
> Q: Did this postal employee, if you remember, did he ever ask you how much you were selling these prints for?
>
> A: No.

(Emphasis added.)

Finally, documentary evidence in this case supports appellant's claim. PS Form 3812, Jan. 1990, states in Block 13, "Describe, using trade names if known, only those articles lost or damaged and specified value of each. Attach invoice if available or evidence of value." PS Form 1000, September 1992, states in Block 10, "Attach evidence of value (*See* cover sheet, item 2, for acceptable evidence.) The cover sheet in turn states:

> **You need three things to file a claim:**
>
> 1. Your original mailing receipt for insured, COD, registered, or Express Mail.
>
> 2. Evidence of value, such as a sale receipt, invoice or bill of sale, statement of costs for reconstruction of Express Mail documents.
>
> Either sender or addressee may furnish evidence of value.
>
> 3. Proof of loss or damage:

This case is simple only if one assumes that evidence exists to support the lower appellate court's factual conclusion of deceit.

GIERKE, Judge (dissenting):

I cannot accept the factual premise for the majority opinion. My problem is with the last sentence quoted by the

majority from the opinion of the court below: "On the three specifications for which appellant was convicted, he actually substantiated the damage claims with receipts in his own handwriting purporting to show that the prints had been sold for $100 each, plus tax and shipping." I do not believe that this factual assertion by the court below is supported by the record. Unfortunately, the majority erroneously accepts the factual premise of the court below, reciting: "As a rational trier of fact could have found the foregoing information from the evidence presented during appellant's court–martial, we are obligated to accept them."__ MJ at (*4*).

The so–called "receipts" actually are invoices accompanying several prints consigned by appellant to his sister, who had agreed to try to sell them. The postal employee's testimony refers to the documents as invoices. The OSI agent, Special Agent Nazarro, testified that when he interviewed appellant, "he said that no money had actually exchanged hands . . . ." There is nothing on the "receipts" reciting an exchange of money. I have found nothing in the record to show that appellant represented that a sale of the claimed items had occurred. A legitimate dispute about the actual value of works of art does not prove a larceny. In my view, no reasonable factfinder could find *mens rea* from this legitimate dispute about the value of works of art. In the absence of evidence of appellant's intent to deceive postal authorities, I am not willing to affirm this conviction. Accordingly, I dissent.

APPENDIX B

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain BRADY L. PERRY, 585–60–3172
United States Air Force

ACM 30766

7 April 1995

Sentence adjudged 15 May 1993 by GCM convened at Offutt Air Force Base, Nebraska. Military Judge: Peter R. Held.

Approved sentence: Dismissal and $3000 fine.

Appellate Counsel for Appellant: Mr. John A. Wickham, Esq. (argued), Colonel Jay L. Cohen, and Captain Eric N. Eklund.

Appellate Counsel for the United States: Captain R. Scott Howard (argued), Colonel Jeffery T. Infelise, and Major E. David Hoard.

Before

DIXON, PEARSON, and GAMBOA
Appellate Military Judges

PER CURIAM:

Contrary to his pleas, appellant was convicted at a general court–martial of one specification of larceny in violation of Article 121, UCMJ, and two specifications of filing false claims in violation of Article 132, UCMJ. Members also found him guilty of violating Article 133, UCMJ, for conduct unbecoming an officer by preparing and filing false claims. However, the Article 133 offense was dismissed by the military judge, who found it multiplicious with the violations of Articles 121 and 132. Appellant was acquitted on additional charges of larceny, filing false claims, and making a false statement regarding a matter within the jurisdiction of an agency of the United States. Members sentenced appellant to a dismissal and a fine of $3000 which the convening authority approved. Having concluded neither of the two assigned errors has merit, we affirm.

Facts

While assigned at Offutt Air Force Base in 1992, appellant, along with his Air Force captain wife, an Air Force major, and the major's civilian wife, established a business to produce and sell commemorative lithographs. They pooled their resources and commissioned an artist to create a lithograph commemorating the stand–down of Strategic Air Command. They arranged for a limited printing of 750 copies of the lithograph, with each print numbered consecutively and signed by the artist. In addition to the 750 numbered prints, the printers also provided them with a supply of unnumbered prints that they could use as replacements if any of the original prints were damaged. Based on testimony at trial, the cost per copy was approximately $2. After discussing what customers might be willing to pay for the item, they initially agreed to sell the prints for $40 a copy. They began advertising and marketing the prints under the name "L & P

Artworks." As the only civilian in the group, the major's wife was the bookkeeper and was the key player in soliciting sales.

On a number of occasions, L & P Artworks deposited lithographs with United Parcel Service or the United States Postal Service for shipment to customers. Appellant and his associates agreed that the prints should be insured for $100 when they were placed in shipment, even though the cost of the prints was only about $2 apiece and the advertised selling price was only $40. Both the United Parcel Service and the United States Postal Service advised that the value of an item did not have to be established at the time of shipment. However, when loss or damage happened, both the United Parcel Service and United States Postal Service required claimants to establish the amount of the damage or the value of any item lost.

As sales of the prints progressed, the group discovered the prints were highly susceptible to damage during shipment. Although they changed the type of container used for shipment, damage continued to occur. When damage occurred during shipment, purchasers were told to return the damaged prints. L & P Artworks replaced the damaged item using the extra prints which the printer had delivered to them. The extra print was assigned the same number as the damaged one. The artist, who had signed the original prints, agreed to sign any prints used as replacements for free. Consequently, L & P Artworks was able to replace any prints damaged during shipment without incurring significant costs.

When the major and his wife received an assignment to England, appellant and his wife negotiated to buy them out. The departing couple received $1200 for their share of L & P Artworks when they left Offutt in early July 1992. At that time, appellant became the principal operator of the business. All of the offenses for which appellant was convicted occurred after appellant and his wife took over the business.

In order to increase sales, appellant and his wife reduced the selling price of the prints in early July 1992 to $29.96. However, appellant continued to claim $100 for each print damaged during shipment. When asked to substantiate the amount claimed from the United Parcel Service or the United States Postal Service, appellant indicated that the amount claimed represented the value of the item. He referred to the fact that the item would appreciate in value over time, that L & P Artworks had agreed to insure the prints for $100, and that $100 was the indicated value of the item at the time it was shipped. On the three specifications for which appellant was convicted, he actually substantiated the damage claims with receipts in his own handwriting purporting to show that the prints had been sold for $100 each, plus tax and shipping.

Assigned Errors

In his two assigned errors, appellant contends the evidence is legally and factually insufficient to support his conviction and his sentence is inappropriately severe. As to the evidence, he contends the acquittals of other specifications of larceny and filing false claims show that "the members found that the $100 declared value per lithograph was reasonable." He argues the convictions cannot stand because the members' findings of guilty are inconsistent with appellant's acquittals on similar charges. In asserting the inappropriateness of his sentence, appellant argues he was prejudiced by the military judge's instructions concerning the ramifications of a sentence to dismissal. He suggests the members may have included a dismissal as a part of the sentence because of the military judge's instruction that appellant's VA benefits may have vested because of an earlier discharge. We find neither assignment of error has merit.

Appellant testified at trial he never sold any of the prints for more than $40. However, on each of the specifications of

which appellant was convicted, he supported his claims by knowingly presenting false receipts purporting to show that the items were sold for $100 each. One of these claims involved 25 lithographs that he sent to his sister in Arkansas in the hope that she could sell them there. When they were damaged in shipment, he presented a receipt showing the items were sold to his sister for $100 each, plus tax and shipping. Having reviewed the record of trial, we are ourselves convinced beyond a reasonable doubt of appellant's guilt with respect to each of the specifications which involved the presentation of false receipts. *United States v. Turner,* 25 M.J. 324 (C.M.A. 1987).

We are not persuaded that the members returned inconsistent verdicts in this case. However, even if we were to agree that the verdicts are somewhat inconsistent, that conclusion would not require us to grant relief. This Court has found that consistency in verdicts is not required. Inconsistencies can legitimately result from a compromise, a mistake, or merely from the desire of members to give the accused a break. *United States v. Commander,* 39 M.J. 972, 976 (A.F.C.M.R. 1994).

In the exercise of our Article 66(c) authority under the Uniform Code of Military Justice, we have considered appellant's assertion that his sentence to a dismissal and a fine of $3000 was inappropriately severe. We have judged the appropriateness of his sentence with due consideration having been given to the seriousness of the offenses and the character of the appellant. *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982). We are satisfied he received no greater punishment than he deserves. *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988). Moreover, we find appellant suffered no prejudice as a result of the military judge's instructions regarding the ramifications of a sentence to dismissal. *See United States v. McElroy,* 40 M. J. 368, 372 (C.MA. 1994).

Having examined the record of trial, the assignments of error, and the government's reply thereto, we have concluded that the findings and the sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the appellant's substantial rights was committed. Accordingly, the findings of guilty and the sentence are

AFFIRMED.

OFFICIAL

ALVIN J. STRIBLING
Technical Sergeant, USAF
Chief Court Administrator